STATE OF MICHIGAN

COURT OF APPEALS

GRAND VALLEY STATE UNIVERSITY,

Plaintiff-Appellant/Cross-Appellee,

v

WEST MICHIGAN DOCK & MARKET CORPORATION,

Defendant-Appellee/Cross-Appellant,

and

WEST MICHIGAN SILVERSIDES,

Defendant.

UNPUBLISHED
November 4, 2004

No. 248020
Muskegon Circuit Court
LC No. 00-040220-CC

GRAND VALLEY STATE UNIVERSITY,

Plaintiff-Appellant/Cross-Appellee,

v

WEST MICHIGAN DOCK & MARKET CORPORATION,

Defendant-Appellee/Cross-Appellant,

and

WEST MICHIGAN SILVERSIDES,

Defendant.

No. 249565
Muskegon Circuit Court
LC No. 00-040220-CC

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

This case arises out of the condemnation of a parcel of waterfront property. Following the withdrawal of a challenge to the necessity of the condemnation, a jury trial was held wherein three appraisal experts rendered opinions addressing the appropriate compensation for the subject parcel. Rather than adopt the opinion of one appraiser, the jury apparently computed compensation by combining the calculations of two aspects of the opinions of two appraisers. The trial court subsequently granted plaintiff's motion for remittitur and granted the defense motion for costs and attorney fees. Plaintiff appealed as of right, and defendant filed a cross appeal. We affirm.

Plaintiff acquired property from alumni and established a water research institute on Muskegon Lake. Plaintiff's ability to use the premises to its full potential was limited. Therefore, plaintiff condemned ninety feet of defendant's property (or .18 acres) to ensure that passing vessels had sufficient clearance space and would not collide. This condemnation would also lift established mooring and docking requirements.[1] At trial, three appraisers rendered their opinion regarding the highest and best use of the property and the appropriate compensation owed to defendant for the condemnation of the subject parcel. All experts opined that they had extensive training in appraisals,[2] and all were licensed in accordance with state requirements. However, there was no educational degree in appraising. Consequently, basic methods of appraisal and common sense were employed in the appraisal process.

The experts disputed the appropriate method of appraisal of this parcel. However, it was agreed that the true value of the parcel was not based on the dryland, but the extension of the riparian rights from the acquisition of the dryland. Plaintiff's expert Burgoyne employed the direct sales comparison approach to appraisal. That is, he compared sales of vacant waterfront property to the purchase at issue. After performing a comparison of different sales, Burgoyne opined that $1200 per foot or $110,000 was fair market value for the subject property, including the riparian bottomland extending to the center of the lake.

The defense presented two experts. Appraiser Walsh admitted that he had worked with Burgoyne for a few years and considered him to be a friend. Despite their past relationship, their valuations diverged extensively. Walsh testified that he applied basic appraisal methods, including the comparative method, but he had to allocate or extract value because of the unique nature of this parcel and its bottomland value. Walsh determined that fair market value of the subject parcel was $615,000. Walsh acknowledged that he was embarrassed by the fact that mistakes in his computation were revealed during his deposition, and he calculated the value of

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[1] Plaintiff was the successor to Lakeland Investments and was bound by the decision in *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505; 534 NW2d 212 (1995), that limited the use of the property.

[2] There was no challenge to the qualifications of the various experts. Rather, plaintiff challenged the methodology employed by the defense experts.

the property three times before arriving at his final valuation. Walsh denied that he invented a theory of appraisal to value the subject parcel.

Defense appraiser Bogner testified that he was authorized to appraise complex properties and specialized in the valuation of marina, waterfront, and planned unit development. He acknowledged the three traditional appraisal methods, but opined that waterfront property was unique and presented a twist on traditional techniques. Therefore, Bogner utilized the principle of substitution to calculate the value of the property, at its highest and best use as a ship basin, at $1,090,000. On cross-examination, Bogner acknowledged that he initially labeled the property on a report as vacant waterfront and had valued the property at $563,000. He later changed the report label to indicate that a ship basin was at issue and the value substantially increased. However, Bogner testified that his initial thoughts on the topic were never conveyed and his valuation at $1,090,000 was consistent.

Plaintiff presented no rebuttal expert following the testimony by the defense appraisers. The jury was instructed that it could render a verdict within the range established by the three experts. After deliberating for a very short time, particularly in light of the complexity of the appraisal testimony, the jury determined that just compensation for the subject parcel was $904,800. The trial court subsequently granted a motion for remittitur and reduced the award to $615,136.

First, plaintiff alleges that the trial court erred in denying its motion in limine to exclude the testimony of the defense appraisers. We disagree. The admissibility of evidence is reviewed for an abuse of discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 614; 600 NW2d 66 (1999). An abuse of discretion will be found only if "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Id*. at 620. Generally, a decision on a close evidentiary question cannot be an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). An error in the admission of evidence will not merit reversal unless a substantial right of a party is affected, and it affirmatively appears that the failure to grant relief would be inconsistent with substantial justice. *Id*. The trial court, in its role as gatekeeper under MRE 702, must ensure that both the methodology upon which the expert draws its conclusions and the data underlying the expert's theories are reliable. *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). "When reviewing a trial court's decision to admit evidence, we do not assess the weight and value of the evidence, but only determine whether the evidence was the kind properly before the jury." *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993). Rather, the weight to be accorded differing opinions presents a question for the jury to decide. *Lincoln v Gupta*, 142 Mich App 615, 627; 370 NW2d 312 (1985). Furthermore, "it is well recognized that strict rules as to the admissibility of testimony are not always enforced in condemnation cases." *Detroit v Hamtramck Community Federal Credit Union*, 146 Mich App 155, 158; 379 NW2d 405 (1985).

We cannot conclude that the trial court's decision to admit the testimony of the defense experts was an abuse of discretion. *Franzel, supra*. The evidence was the kind properly before the jury. *Cole, supra*. Plaintiff contends that the defense experts admitted to inventing new theories of computation in order to appraise the property at its highest and best use. However, review of the testimony reveals that all experts agreed that the highest value of the property was not in the traditional approach of valuation of the dryland, but rather the accompanying water

rights that extended to the center of the lake. Indeed, even Dr. Ward, plaintiff's foundational witness, noted that the true value of the property was to extend the time frame for mooring and docking vessels and the safe passage of vessels because of the increase in waterfront.

Both plaintiff's expert and defense expert Walsh acknowledged the principle of assemblage. Additionally, Walsh testified that he had utilized the comparative method of appraisal, although he found only one comparable, and he further testified that he had to apply the theory in a manner to account for the best use of the property. That is, the best value of the acquisition of the subject property did not lie in the dryland, but rather, in the valuation of the bottomland or water rights. Walsh declined the invitation to label his calculation as the "Walsh theory," yet plaintiff's counsel repeatedly characterized it as such. Walsh's testimony presented a differing opinion than that offered by plaintiff's expert, and the weight to be accorded this opinion presented a question for the trier of fact. *Lincoln, supra*.

With regard to the challenge to defense expert Bogner, plaintiff asserted that he invented a theory to calculate the value of the subject parcel that could not be located in any appraisal text. Bogner testified that he was an expert in the appraisal of waterfront properties. He asserted that waterfront properties presented a unique challenge and a twist on traditional appraisal techniques. Therefore, he employed the principle of substitution to compute the highest and best use of the subject parcel as a ship basin. Bogner denied plaintiff counsel's assertion that this theory could not be located in any appraisal text. Plaintiff's counsel did not present any evidence, only his own argument, to contradict this assertion. Therefore, the difference in opinion with regard to the appropriate method and manner of valuation[3] was properly left for resolution by the trier of fact. *Lincoln, supra*. This information was of the kind properly before the jury, *Cole, supra*, and a flexible approach to admission of evidence is permitted in condemnation cases. *Hamtramck Credit Union, supra*. On this record, the attack to the methodology employed by Bogner is without merit, and the trial court did not abuse its discretion by admitting the expert appraisal evidence.[4]

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[3] We note that the Supreme Court in *Gilbert, supra*, emphasized that the trial court must ensure that the methodology that leads to the expert's conclusion and the data underlying the expert's theory are reliable. On this record, there was no challenge to the qualifications of the defense experts. In fact, plaintiff's expert, Burgoyne, had worked with Walsh and had used comparative properties that had been appraised by Bogner in his assessment of highest and best value. Thus, the challenge is to the appraisal approaches utilized by the defense experts. However, plaintiff did not present rebuttal witnesses to contradict the theories utilized by the experts. Additionally, plaintiff's counsel did not seek to introduce appraisal texts to demonstrate the nonexistence of the principle of substitution. Thus, the evidence at trial consisted of the defense experts opining that they applied traditional appraisal approaches in a novel manner, with plaintiff's counsel arguing the contradiction of that assessment, without evidentiary support. Accordingly, the trial court fulfilled its role as gatekeeper in light of the deficiencies of the challenge by plaintiff's counsel. As an aside, we note that the principle of substitution can be found in appraisal texts and has been characterized as the "basis for the cost approach." The Appraisal of Real Estate (11th ed), pp 43-44.

[4] We also note that plaintiff contends that the cost approach only applies to improved properties
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Plaintiff next alleges that the trial court erred in denying its motion for summary disposition regarding the issue of special purpose property and providing the jury with the instruction for standard purpose property. We disagree. Review of the record reveals that plaintiff did not file a motion for summary disposition, but rather, at the motion for directed verdict stage of the proceeding, characterized the motion as summary disposition. The grant or denial of a motion for directed verdict is reviewed de novo. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). We examine the evidence presented up to the time of the motion in the light most favorable to the nonmoving party with any conflict in the evidence resolved in that party's favor. *Id.* A directed verdict is appropriate only when no factual questions exist upon which reasonable jurors could differ. Where reasonable jurors could reach different conclusions, we will not substitute our judgment for that of the jury. *Id.*

We review claims of instructional error de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). Jury instructions should include all elements of the claim and should not omit material issues, defenses, or theories if the evidence supports them. *Id.* Instructional error will warrant reversal only if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice. *Id.* A standard jury instruction must be given by the court when requested by a party if it is applicable and accurately states the law. MCR 2.516(D)(2); *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 590-591; 657 NW2d 804 (2002). Whether an instruction is accurate and applicable to a case presents a determination within the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

Plaintiff's attempt to exclude the consideration of special purpose property came following the presentation of the testimony by all three experts. Plaintiff's expert and defense expert Walsh opined that the subject parcel was not special purpose property. However, defense expert Bogner opined that the parcel was special purpose property. Moreover, the standard jury instruction provides that special purpose property is of a class not commonly bought and sold with examples that included a church, *college*, or cemetery. The instruction also provides that the determination of whether property is construed as special purpose property is for resolution by the trier of fact. In light of the conflicting expert opinions and the nature of the property condemned, there was a sufficient basis for presenting the issue to the jury. *Cox, supra*. Therefore, we cannot conclude, on this record, that the trial court abused its discretion in presenting this issue to the jury. *Stevens, supra.*[5]

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and the cost of replacement value may not be submitted to the jury. We cannot conclude that plaintiff's assertions are correct. Our research did not reveal that the cost approach is limited to improved properties only. Moreover, there may be general rules of valuation, but there are exceptions to the general rules. See *City of Fenton v Lutz*, 73 Mich App 117, 124-125; 250 NW2d 579 (1977); *Consumers Power Co v Allegan State Bank*, 20 Mich App 720, 737-738; 174 NW2d 578 (1969). Both experts for the defense testified that this property was unique in that its value was not based in the traditional examination of the dryland, but the significant extension of the shoreline and the accompanying riparian rights.

[5] In any event, because plaintiff did not request a special verdict form, we cannot conclude (continued…)

Plaintiff alleges that the trial court erred by denying the motion for judgment notwithstanding the verdict (JNOV). On the contrary, the defense alleges that the trial court erred in granting the motion for remittitur based on the issue of witness credibility. We disagree with both contentions. A trial court's decision regarding a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). When reviewing the trial court's decision, appellate courts view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party. *Id*. Where reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

A new trial or amendment to the judgment may be granted where excessive or inadequate damages appear to have been influenced by passion or prejudice. MCR 2.611(A)(1)(c). Moreover, if the trial court finds that the only error in the trial was the inadequacy or excessiveness of the verdict, a motion for new trial may be denied, conditioned upon the nonmoving party's consent to the additur or remittitur. MCR 2.611(E)(1). The determination, whether the jury award is supported by the evidence, is based on objective considerations relating to the actual conduct of the trial or to the evidence adduced. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989). We consider the evidence in the light most favorable to the nonmoving party when reviewing the trial court's exercise of discretion regarding remittitur. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). When reviewing the grant of remittitur, the appellate court must give due deference to the trial judge who presided over the entire trial, personally observed the evidence and witnesses, and had the unique opportunity to evaluate the jury's reaction to the witnesses and evidence. *Palenkas, supra* at 534. The trial judge is in "the best position to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger." *Id*. "Intangible emotions like prejudice, bias, and anger are often undetectable in a written record, and it is for this precise reason that we defer to the trial court's judgment." *Id*. at 536.

On this record, viewing the evidence in the light most favorable to the defense, the trial court properly denied the JNOV request. *Sniecinski, supra*. Moreover, we cannot conclude that the trial court's decision to grant remittitur constituted an abuse of discretion. *Wiley, supra*. The jury's guide for determination of the compensation to be awarded was contingent upon the appraisal evidence. All experts agreed that the true value of the property rested with the acquisition of the water rights. Indeed, the restrictions regarding the time frame for docking and mooring vessels and the concern regarding safe distance between passage of vessels was alleviated by condemning the subject parcel.

Defense expert Walsh acknowledged that he had to modify and correct his determination regarding the valuation of the parcel. He further testified that he took existing appraisal

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whether unfair prejudice occurred. See *Dedes v Asch*, 233 Mich App 329, 334-335; 590 NW2d 605 (1998), overruled on other grounds 462 Mich 915 (2000). It is questionable whether the jury even concluded if special purpose property was involved in light of its adoption of two computations provided by the experts that testified that this parcel was not special purpose property.

principles and applied them in a novel way because of the nature of this parcel. Defense expert Walsh declined the invitation to name his appraisal the "Walsh theory," and it was plaintiff's counsel who repeatedly characterized it as such. Moreover, plaintiff's counsel insinuated that defense experts Walsh and Bogner had colluded to inflate the valuation of the property, but referred to their actions as "brainstorming." This allegation was denied. While the valuations presented by the defense were high in comparison to that of plaintiff's sole expert, the methodology and calculation of their appraisals was completely different. It did not support the allegation of "brainstorming." Thus, the repeated and sarcastic attacks to the testimony by the defense experts appeared to play a role in the large verdict, as noted by the trial court. On this record, we give deference to the trial court's ability to assess any passion, bias, or anger that occurred during the live proceeding. *Palenkas, supra*. We cannot conclude that the trial court's decision was erroneous in light of the manner in which the case was tried by plaintiff.[6]

Lastly, the parties challenge the award of attorney and appraiser fees and costs. Review of the record reveals that the trial court's assessment and award comported with the requirements of MCL 213.66 as set forth in *Dep't of Transportation v Randolph*, 461 Mich 757, 763-769; 610 NW2d 893 (2000).

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

[6] Defense counsel asserts that the trial court erred in granting remittitur when it rendered the decision solely on the basis of credibility. Review of the trial court's decision reveals that it was not based solely on the credibility of defense expert Bogner. Rather, the trial court noted the manner in which the trial was conducted in addition to questions regarding Bogner's testimony. The defense assertion is simply not supported by the record.